

WAC 173-340-420 Periodic review.¹

(1) Purpose. A periodic review consists of a review by the department of post-cleanup site conditions and monitoring data to assure that human health and the environment are being protected and to determine the effectiveness of the environmental covenant.²

(2) Applicability. The department shall conduct periodic reviews of a site whenever ~~the department conducts a cleanup action; whenever the department approves a cleanup action under an order, agreed order or consent decree; or, as resources permit, whenever the department issues a no further action opinion; and~~ one of the following conditions exists; at the site:

(a) Where an environmental covenant, institutional control, and/or financial assurance is required as part of ~~the an interim action or~~ cleanup action:

(i) At a department conducted remedial action;

(ii) By an order, agreed order or consent decree; or,

(iii) As a condition of a written opinion issued under WAC 173-340-515.

The department may conduct periodic reviews at other facilities as resources permit;³

(b) Where the cleanup level is based on a practical quantitation limit as provided for under WAC 173-340-707; and

(c) Where, in the department's judgment, modifications to the default equations or assumptions using site-specific information

would significantly increase the concentration of hazardous substances remaining at the site after cleanup or the uncertainty in the ecological evaluation or the reliability of the cleanup action is such that additional review is necessary to assure long-term protection of human health and the environment.

(3) ~~General requirements~~ Timing of Periodic Review. If a periodic review is required under subsection (2) of this section, a review shall be conducted by the department ~~at least every five years after the initiation of a cleanup action.~~ the following times:⁴

(a) At least once every five years after an environmental covenant has been recorded.

(b) If an institutional control other than an environmental covenant is required at the site by an order, agreed order or consent decree, or as a condition of a written opinion issued under WAC 173-340-515, at least once every five years after implementation of the institutional control.

(c) If the environmental covenant is not recorded or other institutional control is not implemented, at least once every five years after the environmental covenant or institutional control was required at the site by an order, agreed order or consent decree, or as a condition of a written opinion issued under WAC 173-340-515.

(d) The department may rely on periodic reviews conducted by the United States Environmental Protection Agency to fulfill this requirement.⁵

(4) Periodic review contents. The department may require potentially liable

¹ Use of "environmental covenant" throughout this Section reflects new terminology in Chapter 64.70 RCW, passed in 2007 legislative session.

² Based on RCW 70.105D.030(7).

³ The first change reflects the need for periodic review of interim action sites since they could remain in this status for many years. The second change reflects new language in RCW 70.105D.030(7). "Other facilities" include independent remedial actions not conducted under Ecology's VCP program.

⁴ Based on RCW 70.105D.030(7). (b) and (c) are added to meet legislative intent of RCW 70.105D.030(7), even though a covenant technically hasn't been recorded.

⁵ Through agreement with Ecology, EPA conducts periodic reviews at many superfund sites. This is to acknowledge EPA's role at these sites.

persons, and others⁶ to submit information ~~required~~needed by the department to conduct a periodic review. A periodic review shall include at least the following:⁷

(a) A review of relevant reports documenting conditions at the site and relevant decision documents (e.g. consent decree, order, cleanup action plan or no further action determination);

(b) A review of the title of the real property subject to the environmental covenant to determine whether the environmental covenant was properly recorded and, if applicable, amended or terminated;

(c) A physical inspection of the site to determine compliance with the environmental covenant, other institutional controls, and any other cleanup requirements, including whether any development or redevelopment of the real property has violated any of these requirements; and

(d) An evaluation of the effectiveness of any environmental covenant and other institutional controls in limiting or prohibiting activities that may interfere with the integrity of the remedial action or that may result in exposure to or migration of hazardous substances. This shall include a review of available monitoring data.

(e) A review of any financial assurance mechanisms required by the department under this chapter.

(f) A review of the effectiveness of the remedy in protecting human health and the environment.

(45) Review criteria. When evaluating whether human health and the environment are being protected and the effectiveness of any environmental covenant or other

institutional control,⁸ the factors the department shall consider include:

(a) The effectiveness of ongoing or completed cleanup actions, including the effectiveness of engineered controls, environmental covenants, and institutional controls in limiting exposure to hazardous substances remaining at the site;

(b) New scientific information for individual hazardous substances or mixtures present at the site;

(c) New applicable state and federal laws for hazardous substances present at the site;

(d) Current and projected site and resource uses;

(e) The availability and practicability of more permanent remedies; and

(f) The availability of improved analytical techniques to evaluate compliance with cleanup levels.

(56) Notice and public comment. The department shall publish a notice of all periodic reviews in the *Site Register* and provide an opportunity for public comment. The department shall also notify all potentially liable persons known to the department of the results of the periodic review. A final report of the periodic review shall not be issued until the public comment period has been completed.⁹

(67) Determination of whether ~~amendment of the cleanup action plan required~~. additional remedial action is required.¹⁰ When the department determines that any of the following conditions exists, the department shall take any and all appropriate actions. Where the department requires remedial actions substantially different from a previously approved remedy, the department shall

⁶ Such as prospective purchasers and voluntary cleanup program customers that are not PLPs.

⁷ Based on RCW 70.105D.030(7) and current practice.

⁸ Based on RCW 70.105D.030(7).

⁹ Reflects current practice at most sites. Consistent with MTCA's intent of meaningful public involvement.

¹⁰ Based on RCW 70.105D.030(7).

provide an opportunity for public review and comment on the new remedial actions.

(i) The environmental covenant or other institutional control has not been recorded or otherwise established;

(ii) The environmental covenant or other institutional control has been amended or terminated without proper authority;

(iii) The terms of the environmental covenant or other institutional control have been violated;

(iv) The environmental covenant or other institutional control is no longer effective in limiting or prohibiting activities that may interfere with the integrity of the remedial action or that may result in exposure to or migration of hazardous substances;

(v) The financial assurance mechanism is inadequate; or,

(vi) The cleanup action is no longer protective of human health and the environment. ~~When the department determines that substantial changes in the cleanup action are necessary to protect human health and the environment at the site, a revised cleanup action plan shall be prepared. The department shall provide opportunities for public review and comment on the draft cleanup action plan in accordance with WAC 173-340-380 and 173-340-600.~~¹¹

(7~~8~~) Determination of whether future periodic reviews required. In conducting a periodic review under this section, the department shall determine whether additional reviews are necessary, taking into consideration the factors in subsection ~~(4)~~ **(5)** of this section. Sites with institutional controls shall remain subject to periodic reviews as long as the institutional controls are required under this chapter.

(9) Cost Recovery. A periodic review is a remedial action under this chapter. As

¹¹ Public comment requirement moved up to beginning of subsection.

such, the department may require payment of the costs for periodic reviews under WAC 173-340-550.¹²

(a) Periodic review costs are a component of costs of department conducted remedial actions and the department providing administrative oversight under an order, agreed order or consent decree.

(b) Where the department conditions a written opinion on an environmental covenant or other institutional control which necessitates periodic reviews, periodic review costs are a component of the costs of providing advice and assistance.

(c) The department may require upfront payment of the costs of future periodic reviews as a condition to a settlement, satisfaction of an order, or a written opinion issued under the WAC 173-340-515.¹³

[Statutory Authority: Chapter 70.105D RCW. 01-05-024 (Order 97-09A), § 173-340-420, filed 2/12/01, effective 8/15/01; 91-04-019, § 173-340-420, filed 1/28/91, effective 2/28/91; 90-08-086, § 173-340-420, filed 4/3/90, effective 5/4/90.]

¹² To clarify that periodic review costs are cost recoverable costs under this chapter.

¹³ The option for an upfront payment is proposed to minimize future administrative costs of attempting to recover these costs years or decades later. The specific procedures for implementing this approach would be developed via program policy.

WAC 173-340-440 Institutional controls. (1) **Purpose.** Institutional controls are measures undertaken to limit or prohibit activities or uses of real property or resources that may interfere with the integrity of an interim action or cleanup action or that may result in exposure to hazardous substances at a site. Institutional controls may also include affirmative actions, such as actions to ensure the integrity of an interim action or cleanup action.¹⁴ Institutional controls may include:

(a) Physical measures such as fences;
 (b) ~~Use restrictions such as limitations on the~~ Limitations on activities or uses of the property or resources; ~~or~~¹⁵

(c) Requirements that additional cleanup ~~action occur if~~ be conducted if certain conditions change at the site such as removal of existing structures or pavement ~~are disturbed or removed;~~¹⁶

(e d) Maintenance requirements for engineered controls such as the inspection and repair of monitoring wells, treatment systems, caps or ground water barrier systems;

(e) Periodic reporting requirements;¹⁷

(d f) Educational programs such as signs, postings, public notices, health advisories, mailings, and similar measures that educate the public and/ or employees about site contamination and ways to limit exposure; and

(e g) Financial assurances (see subsection (11) of this section).

¹⁴ Institutional controls are not just negative or restrictive in nature, they may also require certain actions be taken “affirmative actions” such as periodic inspections, monitoring and reporting.

¹⁵ RCW 64.70 (Uniform Environmental Covenants Act or UECA) uses the term “activity and use limitations” to describe restrictions in environmental covenants. That phrase has been used throughout this section.

¹⁶ Editorial changes.

¹⁷ Some environmental covenants require periodic reviews be conducted.

(2) **Relationship to engineered controls.** The term institutional controls refers to nonengineered measures while the term engineered controls means containment and/or treatment systems that are designed and constructed to prevent or limit the movement of, or the exposure to, hazardous substances. See the definition of engineered controls in WAC 173-340-200 for examples of engineered controls.

(3) **Applicability.** This section applies to remedial actions being conducted at sites under any of the administrative options in WAC 173-340-510 and 173-340-515.

(4) **Circumstances required.** Institutional controls shall be required to assure both the continued protection of human health and the environment and the integrity of an interim action or cleanup action in the following circumstances:

(a) The cleanup level is established using Method A or B and hazardous substances remain at the site at concentrations that exceed the applicable cleanup level;

(b) The cleanup level is established using Method C;

(c) An industrial soil cleanup level is established under WAC 173-340-745;

(d) A ground water cleanup level that exceeds the potable ground water cleanup level is established using a site-specific risk assessment under WAC 173-340-720(6)(c) and institutional controls are required under WAC 173-340-720(6)(c)(iii);

(e) A conditional point of compliance is established as the basis for measuring compliance at the site;

(f) Any time an institutional control is required under WAC 173-340-7490 ~~through 173-340-7494;~~ ~~or~~¹⁸

(g) When such controls are required by WAC 173-340-740(6)(f) to prohibit or limit

¹⁸ Reflects a proposed changed to the TEE part of the rule to move all the institutional control requirements to Section 7490.

activities or uses that could interfere with the long-term integrity of a soil containment system; or¹⁹

(h) Where the department determines such controls are required to assure the continued protection of human health and the environment or the integrity of the interim or cleanup action.

(5) Minimum requirements. Cleanup actions that use institutional controls shall meet each of the minimum requirements specified in WAC 173-340-360, just as any other cleanup action. Institutional controls should demonstrably reduce risks to ensure a protective remedy. ~~This demonstration should be based on a quantitative, scientific analysis where appropriate.~~²⁰

(6) ~~Requirement for primary reliance~~ Limit on use of institutional controls.²¹ In addition to meeting each of the minimum requirements specified in WAC 173-340-360, cleanup actions shall not rely primarily on institutional controls and monitoring where it is technically possible to implement a more permanent cleanup action for all or a portion of the site.

(7) Periodic review. The department shall review compliance with institutional control requirements as part of periodic reviews under WAC 173-340-420.

(8) Format of activity and use limitations.²²

(a) Except as otherwise provided for in this section, ~~F~~for properties owned by a person who has been named as a potentially liable person or who has not been named a potentially liable person by the department but meets the criteria in RCW 70.105D.040 for being named a potentially liable person, ~~appropriate institutional controls shall be~~

~~described in a restrictive covenant on the property. The covenant shall be executed by the property owner and recorded with the register of deeds for the county in which the site is located. This restrictive covenant shall run with the land, and be binding on the owner's successors and assigns. activity and use limitations shall take the form of an environmental covenant granted by the property owner to the department or other department approved holder under Chapter 64.70 RCW. The covenant shall be placed on each parcel making up the property following the procedures in Chapter 64.70 RCW and any other applicable laws. The department may also require the holders of other real property interests such as an easement, right of way or mineral rights to subordinate those rights to the department's environmental covenant.~~²³

(b) For properties owned by a local, state, or federal government entity, ~~a restrictive~~ an environmental covenant may not be required if that entity demonstrates to the department's satisfaction that:²⁴

(i) It does not routinely file with the county recording officer records relating to the type of interest in real property that it has in the site; and

(ii) It will implement an effective alternative system to meet the requirements of subsection (9) of this section.

The department shall require the government entity to implement the alternative system ~~as part of the cleanup action plan~~ under an order or decree.²⁵

(iii) If a government entity meets these criteria, and if it subsequently transfers its ownership in any portion of the property,

¹⁹ Added to provide consistency with Section 740(6)(f).

²⁰ This provision has not been found to be practical to implement and is proposed to be removed.

²¹ Editorial change.

²² Editorial change.

²³ Reflects new terminology and practice under UECA. Examples of other laws are state and local government procedures for recording covenants. Also addresses subordination of prior interest holders.

²⁴ Changed to reflect Ecology's role in process.

²⁵ Requirements cannot be imposed through a cleanup action plan, the legal mechanism is a MTCA order or decree.

then the government entity must ~~file a restrictive~~ grant an environmental covenant upon transfer if any of the conditions in subsection (4) of this section still exist.²⁶

Would it be helpful to include more specific criteria for alternative systems for public ROWs?

(c) For properties ~~containing hazardous substances~~ within the site where the owner does not meet the criteria in RCW 70.105D.040 for being a potentially liable person, the department may approve ~~cleanup actions that include restrictive covenants or other~~ of activity or use limitations implemented through legal and/or administrative mechanisms ~~other than an environmental covenant. The use of legal or administrative mechanisms that do not include restrictive covenants~~ This provision is intended to apply only to situations where the release has affected properties within the site near the source of the release not owned by a person meeting the criteria in 70.105D.040 for being named a potentially liable ~~person under the act.~~²⁷

(i) Unless otherwise determined by the department, A potentially liable person must make a good faith effort to obtain ~~a restrictive~~ an environmental covenant before ~~using~~ the department will approve of other legal or administrative mechanisms under this provision.²⁸

(ii) For the purposes of this provision, a good faith effort means public notice was provided to affected property owners, and an attempt was made to engage them in discussions, including offering reasonable monetary compensation for the reduced value of the property as a result of the activity or use limitations.²⁹

²⁶ Editorial changes.

²⁷ Editorial changes.

²⁸ Allows the department to waive this requirement in some instances. Otherwise, editorial changes.

²⁹ New definition of “good faith effort” is intended to clarify this term.

(iii) Examples of such legal or administrative mechanisms under this provision include special building code requirements, zoning overlays, placing notices in local zoning or building department records or state lands records, public notices and educational mailings.³⁰

(9) ~~Restrictive~~ Environmental covenants. Where required, the ~~restrictive~~ environmental covenant shall comply with a department provided format to include the following:³¹

(a) State that the document is an environmental covenant executed pursuant to Chapter 64.70 RCW; *

(b) Contain a legally sufficient description of the real property subject to the covenant; *

(c) Designate the department, or other person approved by the department, as the holder of the covenant; *

(d) Be signed by the department, every holder, and, unless waived by the department, every owner of a fee simple interest in the real property subject to the covenant. To ensure compliance with this provision, the potentially responsible person shall provide the department with the results of a title search conducted within six months prior to recording the covenant for all parcels of real property subject to the covenant; *

(e) Identify the location of the administrative record for the property subject to the environmental covenant; *

(f) Describe with specificity the activity or use limitations on the real property

³⁰ Mostly editorial. Special building codes requirements could include, for example, a requirement to use metal water pipe (rather than plastic) in an area of petroleum contamination or the installation of foundation venting systems in areas of vapor contamination.

³¹ New provisions are based on RCW 64.70. Provisions identified with a “*” are similar to those required by UECA. Provisions identified with a “**” are similar to optional provisions under UECA.

subject to the covenant. * Where applicable, this shall prohibit uses and activities:

(i) Inconsistent with the uses or activities the cleanup standards are based on; **

(ii) ~~Prohibit activities on the site that~~ That may interfere with a cleanup action, operation and maintenance, monitoring, or other measures necessary to assure the integrity of the cleanup action and continued protection of human health and the environment;

(biii) ~~Prohibit activities that~~ That may result in the release of a hazardous substance that was contained as a part of the cleanup action;

(eg) Require notice to the department of the owner's intent to convey any interest in the ~~site~~ property. ** No conveyance of title, easement, lease, or other interest in the property shall be consummated ~~by the property owner~~ without adequate and complete provision for the continued operation, maintenance and monitoring of the cleanup action, and for continued compliance with this ~~subsection~~ chapter;

(dh) Require the ~~land~~ owner to restrict leases to uses and activities consistent with the ~~restrictive~~ environmental covenant and notify all lessees of ~~the such~~ restrictions ~~on the use of the property~~. This requirement applies only to ~~restrictive~~ environmental covenants imposed after February 1, 1996. Lease agreements for tenants do not require this notice when the tenant does not have authorization for uses or activities that have the potential to lead to exposure to the contamination; ³²

(ei) Require the owner to include in any instrument conveying any interest in ~~any portion of~~ the property, a notice of the

~~restrictive~~ environmental covenant ~~under this section;~~

(fj) Require notice to the department of all permit and building applications pertaining to the property and approval by the department of any ~~proposal to use the site~~ proposed activity or use of the property in a manner that is inconsistent with the ~~restrictive~~ environmental covenant; ~~If the department, after public notice and comment approves the proposed change, the restrictive covenant shall be amended to reflect the change; and~~ **

(gk) Grant the department and its designated representatives the right to enter the property at reasonable times for the purpose of evaluating compliance with ~~the cleanup action plan and other required plans this chapter~~, including the right to take samples, inspect any remedial actions taken at the site, and to inspect records; **

(l) The department may also require the environmental covenant to include: ** ³³

(i) A narrative description of the types and locations of hazardous substances remaining on the property and a brief description of the remedy;

(ii) Requirements for periodic inspections and reporting demonstrating compliance with the covenant;

(iii) Limitations on amendment or termination of the covenant in addition to those contained in RCW 64.70.090 and 64.70.100;

(iv) A requirement to reimburse the department for costs related to implementation of the environmental covenant; and

(v) Other information, restrictions or requirements, required by the department.

³² In many cases tenants don't have access beyond the floor space they are leasing and there is little or no opportunity for the tenant to do something that would lead to exposure. For example, upper floor tenants, or tenants within a strip mall. This is intended to address these situations.

³³ All of these fall within the scope of optional requirements allowed under UECA. Costs under (iv) include tasks such as periodic reviews and the processing of notices, applications for approval, transfers, amendments and termination of covenants.

(10) Local government notification.

~~Before a restrictive covenant being established under this chapter, the department shall notify and seek comment from a city or county department with land use planning authority for real property subject to the restrictive covenant. Once a restrictive covenant has been executed, this same department shall be notified and sent a copy of the restrictive covenant. For independent cleanups reviewed by the department under WAC 173-340-515 that use restrictive covenants, the person conducting the cleanup shall be responsible for these notifications. Prior to imposing activity or use limitations at a site, the department shall consult with the city or county land use planning authority for the site. In determining the appropriateness of proposed limitations, the department shall consider potential redevelopment and revitalization opportunities, information regarding present and proposed land and resource uses, the comprehensive land use plan and zoning provisions applicable to the site and other factors identified in the consultation process.~~³⁴

(11) Financial assurances. The department shall, as appropriate, require financial assurance ~~mechanisms~~ at sites where the cleanup action selected includes engineered and/or institutional controls. It is presumed that financial assurance ~~mechanisms~~ will be required unless the PLP can demonstrate that sufficient financial resources are available and in place to provide for the long-term effectiveness of engineered and institutional controls adopted. ~~Financial assurances shall be of sufficient amount to cover all costs associated with the operation and maintenance of the cleanup action, including~~

³⁴ Reflects new requirement in RCW 64.70.040 and RCW 70.105D.030(1)(f).

~~institutional controls, compliance monitoring, and corrective measures.~~³⁵

(a) Mechanisms. Financial assurance mechanisms may include one or more of the following: A trust fund, a surety bond, a letter of credit, financial test, guarantee, standby trust fund, government bond rating test, government financial test, government guarantee, government fund, or financial assurance mechanisms required under another law (for example, requirements for solid waste landfills ~~or treatment, storage, and disposal facilities~~) that meets the requirements of this section. When required by the department, the financial assurance mechanism shall meet the requirements of WAC 173-303-620 (Financial Requirements for Hazardous Waste Facilities). Unless otherwise required by the department, the original financial assurance instrument shall be submitted to the department.³⁶

(b) Amount of financial assurance. ~~Exemption from requirement.~~ The department shall not require financial assurances if persons conducting the cleanup can demonstrate that requiring financial assurances will result in the PLPs for the site having insufficient funds to conduct the cleanup or being forced into bankruptcy or similar financial hardship.³⁷

Option 1: Coverage for all costs associated with the operation and maintenance of the cleanup action, including institutional controls, compliance monitoring, periodic reviews and corrective measures in the event of a failure of the remedial action.³⁸

³⁵ Moved to (b).

³⁶ Reflects current practice.

³⁷ Provision proposed for elimination since these are situations where financial assurance is most needed. MTCA now provides for settlements with parties with a limited ability to pay (RCW 70.105D.130).

³⁸ These two options are being considered to provide more specificity on the amount of financial assurance to be provided. Option 1 is the full meal deal in every

Option 2: Coverage for just the costs of implementation of institutional controls, compliance monitoring and future periodic reviews. Coverage for other costs optional (i.e. operation and maintenance of the cleanup action and corrective measures.)

(12) Removal Amendment or termination of restrictions. If the conditions at the site requiring an institutional control under subsection (4) of this section have changed or no longer exist, then the owner may submit a request to the department that the ~~restrictive covenant or other restrictions~~ institutional control be amended or eliminated. The ~~restrictive covenant or other restrictions~~ institutional control shall be ~~removed,~~ amended or terminated if the department, after public notice and opportunity for comment, concurs. Amendment or termination of environmental covenants executed under Chapter 64.70 must also follow the procedures in Chapter 64.70 RCW.³⁹

(13) Cost Recovery. The department may require payment for its cost of reviews and actions under this section under WAC 173-340-550 including:⁴⁰

(i) Review and processing of proposed environmental covenants and other institutional controls;

(ii) Review and processing of notices and applications for approvals required by environmental covenants or other institutional controls; and

(iii) Applications for amendment or termination of environmental covenants or other institutional controls.

case; Option 2 allows Ecology discretion on what to require beyond basic requirements.

³⁹ Editorial and other changes to conform to RCW 64.70.

⁴⁰ Reflects current practice. Item (i) reflects current practice. Ecology has recently been processing items in (ii) and (iii) under the voluntary cleanup program where an order or decree does not specify a particular cost recovery mechanism.

(14) Effect of nonconforming environmental covenants. Environmental covenants and deed restrictions recorded prior to the effective date of this chapter that are not in the exact format or content specified in this section are not intended to be made invalid or unenforceable by any changes to this section.⁴¹

[Statutory Authority: Chapter 70.105D RCW. 01-05-024 (Order 97-09A), § 173-340-440, filed 2/12/01, effective 8/15/01; 96-04-010 (Order 94-37), § 173-340-440, filed 1/26/96, effective 2/26/96; 91-04-019, § 173-340-440, filed 1/28/91, effective 2/28/91.]

⁴¹ To clarify the status of nonconforming covenants.